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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-471

E. R. REID, *et al.*,

Petitioners,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA UAW, LOCAL UNION 1093,

Respondent.

REPLY BRIEF TO OPPOSITION TO CERTIORARI.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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REPLY BRIEF TO OPPOSITION TO CERTIORARI.

STATEMENT.

This brief is filed in reply to the brief of respondent in opposition to the grant of a writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in this case. It is confined, insofar as possible, to arguments raised for the first time in the opposition's brief.

I

Respondent Committed Legal Wrong When It Used Agency Fees Over Objection for Politics.

Respondent does not contend and indeed it cannot contend that petitioners as nonmembers of the Union are required to resort to the internal union remedy. Two rather recent decisions of this Court emphasize the lack of any such authority by the Union. In *NLRB*

v. Granite State Joint Board, 34 L.Ed.2d 422, 426 (1972) and *Booster Lodge, No. 405 IAM v. NLRB*, 34 L.Ed.2d 662 (1972), this Court held that the Union has no more control over a nonmember than over a man in the street.

Respondent, however, seeks to achieve the same result on the theory that the nonmember who is within the bargaining unit must exercise his right under the internal union remedy since he otherwise suffers no legal wrong. The District Court so held, but the Tenth Circuit did not, merely declaring that the existence of the internal union remedy negates any breach of the duty of fair representation (A[1] 13, 14). But a legal wrong occurred every time plaintiffs' funds were used over objection for political and ideological purposes. When suit was brought in 1967, there was no opportunity to exercise any right of resort to an internal union remedy meeting the standards of *International Machinists v. Street*, 367 U.S. 740 (1961) and *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963). The suit when brought sought relief from legally recognized wrongs. The right to this relief was not subsequently destroyed by the later establishment of the internal union remedy making the Union judge and jury in its own case following the precedent in the mouse's tale in Chapter 3 of Alice in Wonderland: "Said the mouse to the cur, 'Such a trial, dear sir, With no jury or judge would be wasting our breath.' 'I'll be judge, I'll be jury,' Said cunning old Fury: 'I'll try the whole cause and condemn you to death'."

Respondent's argument that the right to relief was destroyed when the internal union remedy was

[1]The abbreviation "A" refers to the Appendix to the Petition.

put into effect *post litem motam* really amounts to saying that the provision of a new remedy rendered moot an action which had previously been good. But this Court in *Powell v. McCormack*, 395 U.S. 486, 496-7 (1969) held that the availability of another remedy does not render a controversy moot.

Even if respondent were bound to exercise a right given by the Union Constitution under penalty of being deprived of the judicial remedy prescribed in *Street* and *Allen*, that penalty could not be enforced without manifest injustice with respect to misappropriations of money to politics occurring before the establishment of the internal union remedy of 1968.

Street was decided in 1961, *Allen* in 1963 and the president of the Union in 1964 publicly admitted the illegality of the use of funds of objecting members for politics. The delay until 1968 of the establishment of the internal union remedy amounted to laches.

II

Respondent's Right to Judicial Review of Decisions Under the Internal Union Remedy Is Uncertain.

The respondent argues that if petitioners should be dissatisfied with the refund awarded to them under the internal union remedy, they would have a right to judicial review. This may or may not be true and the petitioners should not be relegated to the dubious existence of the right of review.

The District Court found that under Article 32 § 3 (b) of the Constitution of the Union, "the Public Review Board has the authority and duty to make final and binding decisions in all cases appealed to it in accordance with the revised provision of Article 16" (A 23). Similarly, under Article 33 § 9, "all decisions of

the Convention Appeals Committee shall be final and binding [R 651]. While it is possible that in a suit for judicial review the Courts may disregard these final and binding declarations, there is no certainty that this would be the result. The petitioners should not be required to assume the risk.

III

Respondent Has Failed to Discharge the Burden of Showing Absence of Relevant Issues of Material Fact.

Petitioners objected below to the internal union remedy because many of its provisions are arbitrary, unreasonable and invalid. In support of these contentions they singled out specific provisions of Article 16 § 7 of the Union's Constitution containing the new provisions. In almost every instance, respondent defended by saying that the provisions under attack would be disregarded and more liberal rules observed. The Courts below disregarded the objections as consisting of mere conjecture as to how the remedy might work in imaginary circumstances. Petitioners submit that the remedy should be construed under the actual provisions contained within the four corners of Article 16 of the Union Constitution in light of its legislative history, and that the pronouncements of counsel for respondent modifying its actual language to suit the exigencies of the litigation cannot be assumed to be a valid exercise of authority to amend the Union Constitution.

These questions must be considered in the frame of the ultimate issue in this case—whether the motion for summary judgment was properly granted under Rule 56 of the Rules of Civil Procedure. Two conditions precedent are that "there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law." The respondent, as the moving party, has the burden of showing the absence of a genuine issue concerning any material fact. *Adickes v. Kress Co.*, 398 U.S. 144, 159-61 (1970). The respondent has not met this burden. The lower Courts erroneously proceeded as if the burden were on the petitioners, not the respondent.

One issue below regarding the validity of the remedy was whether, despite the unctuous piety of the protestations by the Union, the remedy was merely the latest move in the history of its attempt to use dues and fees for political purposes with as little interference as possible from dissenters. The UAW, in Article 2 of its Constitution, declares its purpose to seek its objectives through political activity as well as through collective bargaining, and it has consistently pursued both methods. Before 1968 the refunds were limited (RB,[2] 3, 4) to the small deductions for the "Citizenship Fund", and even then they were made not to those whose money was misappropriated, but to a charity selected by the Union. After 1968 the procedure has been such as to chill the exercise of the right to protect the use of the funds for politics.

Another issue below related to a restriction of money spent for activities or causes primarily political in nature. The committee drafting this amendment in reporting to the Union Convention defined the payments subject to protest as those used in "partisan political expenditures" covering "partisan political activities and expenditures." [Affidavit of Emil Mazey]. The committee also reported that "based on past experience we believe that the percentage will be very

[2]The abbreviation "RB" is used for Respondent's Brief.

small" [*Id.*]. From this it should be apparent that even if he should get anything back by way of refund it would be very little. Nowhere is this point more graphically illustrated than in the affidavits produced by respondent showing the working of the 1968 amendment. They merely say that certain applications for refund had been made and had been granted. They fail to state anything about the critical issue regarding the amounts of the refunds or the "proportion that union political expenditures bear to total union expenditures" mentioned by this Court in *Allen* (363 U.S. at 122).

Another issue below related to the time-consuming procedure of Article 16. To invoke the remedy a letter of objection must be filed with the International Secretary-Treasurer. The objection "shall be determined by a Committee of the International Executive Board, which shall be appointed by the President, subject to the approval of said Board." If an objecting member is dissatisfied he may appeal directly to the full International Executive Board. If he is still dissatisfied, he may appeal at his option to the Public Review Board or the Convention Appeals Committee. The rule that his initial objection may be filed only during the first fourteen days following each anniversary of Union membership, may entail a delay of as much as 11½ months between the time a member decides to make an objection and the time that he may file it.

These lengthy procedures fail to meet the standards of a reasonable length of time for the exhaustion of internal union procedures set forth in an analogous type of proceeding covered by § 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959, 29 USCA 411(a)(4), which provides that no

labor organization shall limit the right of any member to institute an action before any Court or administrative agency, provided that the member may be required first to exhaust reasonable internal hearing procedures but not to exceed a four-months' length of time. *NLRB v. Shipbuilding, Local 22,* 391 U.S. 418, 20 L. Ed.2d 706 (1968).

None of these issues are based on speculations or conjectures; they arise from the specific provisions of the amendment to the Union's Constitution. The issues concerning them below were genuine issues of material fact as to which respondent had the burden of proof, which could be resolved only at a trial. The lower Courts erred in summarily dismissing them as baseless.

The same thing is true regarding still another issue below—whether petitioners had actual or constructive notice of the 1968 internal remedy. The record is barren of any basis for a finding of constructive notice to a nonmember of changes in the Union Constitution. The petitioners Reid and Lochrie stated in affidavits that they and their fellow plaintiffs had never heard of any rebate procedure until the question arose while the litigation was in progress [R 295, 300]. The respondent relied on the affidavit of a Union officer that agency fee payers are eligible for strike benefits which, of course, does not prove that they asked for and received such benefits, much the less that they knew about the amendment of the Constitution covering rebates. The respondent failed to meet the burden of proof on this issue. There is no supporting evidence for the District Court's finding that petitioners had actual and constructive notice of the new internal remedy [FF19, A20].

Conclusion.

Petitioners brought their suit six years ago. The summary judgment granted below would wipe out any progress that has been made in the litigation in the intervening period and would force them to start all over again despite the fact that when they brought their suit they had a clear legal right to judicial relief under the principles laid down by this Court in *Street* and *Allen* and restated by the Ninth Circuit in *Seay v. McDonnell Douglas,* 427 F.2d 996 (CA 9, 1970) and by the District of Columbia Circuit in *Marker v. Shultz,* 83 LRRM 3026 (1973). There is no basis in law or justice or equity for such a result.

Respectfully submitted,

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